Azizah bte Zainal Abidin & Ors v Dato' Bandar Kuala Lumpur

HIGH COURT (KUALA LUMPUR) — GUAMAN NO S 5-21-34-1997
JAMES FOONG J
11 FEBRUARY 1999

Local Government *— Maintenance and repair — Expanding and widening of river — Whether trespass — Defendant relied on Street, Drainage and Building Act 1974 ss 53(1) & 54(1)*

Word and Phrases *— 'Water-sources' — Street, Drainage and Building Act 1974 s 53(1)*

The plaintiffs were the registered owners of undivided shares in a piece of land. There was a river running substantially along and to a greater part inside the boundary of the land. The defendant was a corporation created by statute and was the local authority over the land. The defendant, through its appointed contractors undertook works ('the works') to channelise the river to primarily alleviate floods along the river. The river's area was expanded and due to its widening and it encroached on to the plaintiffs' land by 2,258 square feet. For that, no damages or compensation was paid to the plaintiffs. The plaintiffs claimed damages based on trespass and in the alternative, they were also asserted that the provision of s 54(1) of the Street, Drainage and Building Act 1974 ('the Act') relied on by the defendant to carry out the works contravened art 13(2) of the Federal Constitution rendering it ineffective and inapplicable. The defendant argued that it did not enter the land unlawfully and that its workers has carried out the works lawfully and legally by virtue of s 53(1) of the Act. The defendant relied on s 54(1) of the Act and contended that even if there were any damages, it was duly compensated.

Held, dismissing the plaintiffs' claim with costs:

(1) To adopt a restrictive view of the word 'water-courses' under s 53(1) would create havoc in the management and maintenance of the water system under the jurisdiction of any local authority. 'Water-courses' under the provision of the Act must include those which are natural as well as man-made. Thus, the defendant has a legal right to enter upon the land for the purpose as specified in s 53(1). There was also no substantiating evidence to support an allegation of trespass ab initio (see pp 409F–G and 411C–D).

(2) The works carried out by the defendant was for maintenance and upkeep of the water-courses and not for making new ones. No compulsory acquisition was ever sought for or enforced; thus no part of the plaintiffs' land was ever acquired by the defendant. For these reasons, s 53(1) of the Act did not violate art 13 of the Federal Constitution (see p 412D–F).

[Bahasa Malaysia summary

Plaintif-plaintif adalah pemilik-pemilik berdaftar sekeping tanah yang tidak dipecah. Terdapat sebatang sungai yang mengalir sepanjang dan sebahagian besarnya dalam sempadan tanah tersebut. Defendan adalah satu badan yang ditubuhkan oleh undang-undang dan adalah pihak berkuasa tempatan ke atas tanah tersebut. Defendan, melalui kontraktor yang dilantiknya, telah menjalankan kerja-kerja penerusan ('kerja-kerja tersebut') sungai tersebut untuk mengelakkan banjir di sepanjang sungai tersebut. Kawasan sungai tersebut telah dibesarkan dan kerana pelebaran sungai dan ia telah menceroboh kawasan tanah plaintif-plaintif sebanyak 2,258 kaki persegi. Tiada ganti rugi atau pampasan dibayar kepada plaintif-plaintif. Plaintif-plaintif telah menuntut ganti rugi berdasarkan pencerobohan dan secara alternatifnya, mereka juga menyatakan bahawa peruntukan s 54(1) Akta Jalan, Parit dan Bangunan 1974 ('Akta tersebut') yang dipakai oleh defendan untuk menjalankan kerja-kerja tersebut telah melanggar perkara 13(2) Perlembagaan Persekutuan lalu menjadikannya tidak berkesan dan tidak terpakai. Defendan telah berhujah bahawa ia tidak memasuki tanah tersebut secara haram dan bahawa para pekerjanya telah menjalankan kerja-kerja tersebut mengikut undang-undang di bawah s 53(1) Akta tersebut. Defendan telah bersandar kepada s 54(1) Akta tersebut dan menyatakan bahawa biarpun terdapat sebarang kerugian, pampasan telah diberi.

Diputuskan, menolak tuntutan plaintif-plaintif dengan kos:

(1) Pandangan terbatas ke atas perkataan 'saliran-saliran air' di bawah s 53(1) akan mengkucar-kacirkan pengurusan dan penyelenggaraan sistem pengaliran air di bawah bidang kuasa sebarang pihak berkuasa tempatan. 'Saliran-saliran air' di bawah peruntukan Akta tersebut mestilah termasuk yang semulajadi dan juga yang dibuat. Oleh itu, defendan mempunyai hak undang-undang untuk memasuki tanah tersebut bagi tujuan yang dinyatakan di bawah s 53(1). Juga tiada sebarang bukti untuk menyokong dakwaan bahawa defendan telah menceroboh ab initio (lihat ms 409F–G dan 411C–D).

(2) Kerja-kerja yang dijalankan oleh defendan adalah kerja penyelengaraan saliran-saliran air; bukannya membuat saliran yang baru. Tiada pengambilan tanah wajib diminta atau dikenakan; oleh itu tiada bahagian tanah plaintif-plaintif yang diambil oleh defendan. Atas alasan-alasan tersebut, mahkamah mendapati bahawa s 53(1) Akta tersebut telah tidak melanggar perkara 13 Perlembagaan Persekutuan (lihat ms 412D–F).]

Notes

For cases on maintenance and repair, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 86–87.

Cases referred to

PP v Pengurus Hong Trading & Co [1985] 1 MLJ 366 (refd)
Segar Restu (M) Sdn Bhd v Wong Kai Chuan [1994] 3 MLJ 530 (refd)

Legislation referred to

Federal Constitution art 13(2)
Street, Drainage and Building Act 1974 ss 50(1) 53(1), 54(1)

Azahar (*Suzilawati* with him) (*Wam Marican, Hamzah & Shaik*) for the plaintiffs.
Thangaraj Balasundram (*Thangaraj & Associates*) for the defendant.

James Foong J: The first six plaintiffs are the registered owners of undivided shares in a piece of land held under GM488 for Lot 514 in the Mukim of Setapak, Negeri Wilayah Persekutuan ('the land'). There is a river, commonly known as Sungai Belongkong ('the river') running, substantially along and to a greater part inside the boundary of the land.

The defendant is a corporation created by statute under the Federal Capital Act 1960, and is the local authority over the land.

Sometime in June 1996, the Jabatan Saliran Pengurusan Sungai ('JSPS') of the defendant, through its appointed contractors, undertook works ('the works') to channelise the river. This was by placing L-shape concrete slabs closely together along the embankments. By this exercise the following will be achieved:

(i) soil erosion will. be prevented and minimised;

(ii) water in the river will flow smoothly along a more definite and defined course;

(iii) the depth of the river will be increased to accommodate greater volume of water during heavy and/or frequent down pour;

(iv) the silt deposited in the river from upstream will be easily removed.

The upshot of all these is primarily to alleviate floods along the river.

There is no denial from the plaintiffs, as well as the residents along this stretch of the river where the works was undertaken, that this project, once completed by the defendant, has brought enormous benefits to them. But what they are quarrelling about is that they are not compensated for areas of their land utilised for the project. In the case of the plaintiffs, the original area occupied by the river in the land was 7,565 square feet. When the works were completed, it expanded to 9,823 square feet. This obviously is due to the widening of the river. For the loss of 2,258 square feet, no damages or compensation was paid to them by the defendant.

The plaintiffs' claim

Dissatisfied, the plaintiffs in their statement of claim, from what I make out, are claiming damages based principally on trespass. In the alternative, they are also asserting that the provision of the law (s 54(1) of the Street,

Drainage and Building Act 1974 ('the Act') relied on by the defendant to carry out the works contravened art 13(2) of the Federal Constitution, rendering it ineffective and inapplicable.

The defendant's defence

The defendant denies trespass and relies on its statutory right under s 54(1) of the Act to carry out such works; and even if there were any damage costs during the works, it was duly compensated.

The issue of trespass

To determine the first issue of trespass, it is necessary from the outset to define who a trespasser is. For this, I am greatly assisted by Justice Abdul Malik Ishak's judgment in *Segar Restu (M) Sdn Bhd v Wong Kai Chuan* [1994] 3 MLJ 530 where he restated this aspect of the law as follows:

> ... Who is a trespasser? In law, a trespasser is one who wrongfully enters on land in the possession of another, and has neither right nor permission to be on the land. Lord Dunedin in *Robert Addie & sons (Collieries) Ltd v Dumbreck* [1929] AC 358 at p 371 aptly described a trespasser as one 'who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to'.

But as contended by the defendant: it did not enter the land unlawfully. Its workers carried out the works on the land lawfully and legally by virtue of s 53(1) of the Act. This section reads as follows:

> Local authority to repair and alter and may discontinue surface and storm water drains, etc
>
> The local authority shall maintain and keep in repair and, as it sees fit, enlarge, alter, arch over or otherwise improve all or any of the surface and storm water drains, culverts, gutters, and water-courses under the control of the local authority and may discontinue, close up or destroy such of them as it deems useless or unnecessary:
>
> Provided that the local authority shall before entering any private property for the purpose of carrying out any work under this subsection, give reasonable notice in writing in that behalf, and shall in carrying out such works do as little damage as may be and shall make full compensation for any damage done.

The immediate response to this from the plaintiffs is that the river does not fit the description of any of the items listed under s53 (1) of the Act. There is no specific mention of river or stream in this provision of the law. And by the ejusdem generis rule of interpretation, all these items — 'surface and storm water drains, culverts, gutters, and water-courses' expressed in s 53(1) of the Act must genetically denote structures that are artificial or man-made, rather than things which are natural, such as a stream or a river, of which Sungai Belongkong is one.

After reviewing the fairly substantial evidence on the origin and history of the river, I conclude that Sungai Belongkong is a copious natural stream of water flowing in a channel which ultimately discharges into the sea. It is

A a tributary to the more renowned Sungai Gombak which passes through the heart of Kuala Lumpur. It did, before the works, flowed through a natural water course and not in a man-made structure. In such nature, the next question is whether it falls within any of the descriptions specified under s 53(1) of the Act.

B Undoubtedly except for 'water-courses' all preceding items to this described in s 53(1) of the Act imply artificial man-made configurations. If adopting the ejusdem generis rule of interpretation of statute, where particular words are followed by general words the general words are limited to the same kind as the particular words, then 'water-courses' may be interpreted to associate with those made by man as distinguished from C those created naturally. But this approach can be departed if 'there is something to show that a wider sense (to the general word) was intended': see Eusoff Chin J (as he then was) in *PP v Pengurus Hong Trading & Co* [1985] 1 MLJ 366. I am of the view that the situation before me is a case in point where this exception to the ejusdem generis rule applies, and that Parliament in its wisdom, when enacting this piece of legislation (the Act) D must have intended a wider meaning to the word 'water-courses' to include that water-courses created naturally. When one examines the descriptions of all the descriptive items listed in s 53(1) of the Act they relate to devices meant for the transportation of water from one place to another; whether the water comes from the household tap or a natural spring or river. But are these devices within any any local authority area strictly confined to only E man-made materials? I am afraid not. The flow of water passes through both natural and man-made water-courses, and in many instances they are inter-connected at intervals. To adopt a restrictive view on the interpretation of the word 'water-courses' will not only be inapplicable but also create havoc in the management and maintenance of the water system F under the jurisdiction of any local authority. Imagine water flowing through a natural stream connected on one end by a concrete water drain and the other by a structured gutter. If erosion occurs in the stream, clogging up the water flow, the local authority, in-charge of management and maintenance of the water system of the area, is not authorised to repair this particular section while it is permissible to do so at both ends. This makes no logical G sense and I am certain, the legislature never intended this. 'Water-courses' under this provision of the law must include those which are natural as well as man-made. In the case of Sungai Belongkong which is a natural water-course, the defendant has jurisdiction to manage and maintain it under s 53(1) of the Act.

H Though having decided that the defendant has a legal right to enter upon the land for the purpose as specified in s 53(1) of the Act, the proviso thereto requires prior notice of entry into the land must be given to the plaintiffs, and in carrying out the works the defendant must 'do as little damage as may be and shall make full compensation for any damage done.' Towards these the plaintiffs took issues.

I The first is the allegation that no reasonable notice in writing of the works was forwarded to the plaintiffs. Considerable amount of evidence was advanced by both parties to prove and disprove this. However, after due

consideration I am not convinced by this plaintiffs' claim. The following are my reasons: A

Firstly, the defendant has produced a copy of a notice dated 12 April 1996, informing, in a comprehensive manner, not only the works then proposed to be carried out, but also the relevant provision of the law enacted for the purpose. The addressee of this notice is 'Pemilik Lot 514, Kg Sungai Mulia, Jalan Gombak, 53000 Kuala Lumpur.' According to the defendant's witness, this address was obtained from the department in charge of collecting quit rent of the land. There was no denial from the plaintiffs that this was not their postal address. Their only claim was that this notice was not received. But how could this be when it was properly sent by pre-paid post, and when the entire procedure of posting this letter from the stage when it was signed right to the point when it was recorded as being sent out was explained in evidence by the defendant? Further, in accordance with s 120(1)(c) and (2) of the Act, such service is deemed good when it was: forwarded 'by post in a pre-paid cover addressed to such person at his usual or last known place of abode or business', and served on the owner or occupier of any premises 'if addressed by the description of the 'owner' or 'occupier' of such premises without further name or description." B C D

Secondly, there is the evidence from the plaintiffs that their appointed caretaker, PW1, resided at the address stated in the notice. And he (PW1) had attended all meetings held prior to the works where explanations and elaborations of the job to be done by the defendant were given. This implies three things: (a) the notice was probably received as there was someone residing on the land where it was sent; (b) PW1, being the agent of the plaintiffs, having received the letter would imply knowledge of its contents to the plaintiffs; (c) PW1 attended the meetings upon knowledge he received from the notice. E F

Thirdly, there is a record in writing on a copy of this notice kept by the defendant, of the name of the 1st plaintiff and a telephone number. According to defence witness, DW2, this recording was done by her pursuant to a telephone call she received from the first plaintiff. Though the 1st plaintiff denied this assertion, there is an admission that the telephone number written by DW2 on the copy of this notice was of her parents who were having charge of the management of the land. With such a recording corresponding to the personalities involved with the land, I am further convinced that this notice was duly sent and acknowledged by the plaintiffs, their agent and/or their servant. G H

Refusing to concede, the plaintiffs submitted that even if the works fall within the scope of s 53(1) of the Act, and reasonable notice was given in accordance with the proviso thereto, the defendant was still a trespasser by committing 'trespass ab initio'. To explain this Latin phrase, En Azahar quoted a text from *Winfield Jolowicz on Tort* (13th Ed) at p 36 which states: I

> When an entry upon land or other prima facie trespass is justified by authority of the law itself, then, according to an ancient doctrine of the common law, if the actor abuses his authority he becomes a trespasser ab initio; his act is

A reckoned as unlawful from the very beginning, however innocent his conduct may have been up to the moment of the abuse. The doctrine applies only if the authority is that of the law, not that of other party concerned, and the abuse must be by positive act, not a mere omission.

But what abuse did the defendant commit? Though it is pleaded in the B plaintiffs' statement of claim that the defendant had failed to: (a) manage and organize the works reasonably from time to time as promised to the residents of the area around the land; (b) avoid damage of properties in the course of the work; and (c) had exceeded their original programme of works, there is practically no evidence adduced to support these contentions. This court was informed by PW1 that only two coconut trees C on the land were removed together with some turf which grew around the embankment of the river. But these, the defendant insisted, were fully compensated, as required by s 53(1) of the Act. Without substantiating evidence to support this plaintiffs' claim, I am afraid the allegation of the defendant being trespass ab initio finds no favour in this court.

D On the subject of compensation for damage caused while the works proceeded, there is a challenge by the plaintiffs that they were never paid by the defendant for such. But this is untrue. When PW1, the servant and/or agent of the plaintiffs, was cross-examined on whether he received any compensation from the defendant or its contractors, he replied categorically in the negative. However, when subsequently encountered with a receipt E which he had signed for RM400 from the defendant's contractor, he attempted to explain that this was payment for rental of a space on the land to store the defendant's contractor's equipment and machinery. To me, this explanation was an afterthought to ward off an exposure to his incredible claim. I tend to accept what was testified by the defendant's contractor involved in paying this compensation to PW1. According to him, there was F no necessity to rent from the plaintiffs any space on the land for storage. Each day a sufficient number of L-shape concrete slabs were delivered to the site from their yard. These were then installed on the same day. As the works were never static but progressed along the river each day their machinery followed to the new location — not requiring storage at any one particular place. This sum of RM400 was paid to PW1 for compensation of G the fallen coconut trees and for turf that was removed.

Having decided on the above, the next question is whether this sum of RM400 is sufficient, for s 53(1) of the Act requires the defendant to 'pay full compensation for any damage done.' To do so, obviously one begins by investigating what damage was done.

H From evidence, it was only the coconut trees and the turf. Though there were some disputes as to the number of fallen coconut trees, but even accepting the higher number of 5, and together with the removed turfs, I think RM400, so paid to PW1 as servant and/or agent of the plaintiffs, is more than adequate and sufficient.

I *Article 13 of the Federal Constitution*

The second claim of the plaintiffs, which is in the alternative, pivots on art 13(2) of the Federal Constitution which promulgates that:

> No law shall provide for compulsory acquisition or use of property without adequate compensation.

According to the plaintiffs, s 53(1) of the Act relied on by the defendant to carry out the works, contravenes this article of the Federal Constitution by depriving them of part of the land and providing no adequate compensation; accordingly this provision of the law is ineffective and inapplicable.

To analyse this, I must determine whether there was compulsory acquisition or use of the land. In full agreement with the defendant's counsel, I find none. The works carried out by the defendant was for maintenance and upkeep of the water-course; not by making new ones. If it was the latter, then s 50(1) of the Act would apply, where compulsory acquisition may be requested for by the defendant. But in this case, no compulsory acquisition was ever sought for or enforced; thus no part of the plaintiffs' land was ever acquired by the defendant. As for: 'use of the property', I cannot consider what the defendant did falls within this definition. As reiterated, the defendant only carried out repairs and maintenance works thereon. This cannot be taken as 'use of the property.' By these reasons, I find that s 53(1) of the Act has not violated art 13 of the Federal Constitution.

Conclusion

Based on the aforesaid, I accordingly dismiss the plaintiffs' claim with costs.

Plaintiffs' claim dismissed with costs.

Reported by Zahid Taib